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Supreme Court of the United States

October Term, [redacted] 63

No. [redacted] 4

ROBERT WILLIAMS,

Petitioner,

against

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Supreme Court of the United States

October Term, 1960

No.

ROBERT WILLIAMS,

Petitioner,

against

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner Robert Williams respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above entitled case on January 20, 1961, affirming a judgment of conviction in the Superior Court of Union County, North Carolina, after trial *de novo* on appeal from a judgment of conviction in the Recorder's Court of Union County, North Carolina.

Opinion Below

The Superior Court of Union County wrote no opinion. The Supreme Court of North Carolina affirmed in an unreported opinion, appended hereto as Appendix A, p. 14. That opinion relied upon an opinion handed down the same day in the case of *State of North Carolina* v. *Avent*, 253 N. C. —, 118 S. E. 2d 47, which opinion is appended hereto as Appendix B, p. 18.

Jurisdiction

The judgment of the Supreme Court of North Carolina was made and entered January 20, 1961. Jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Questions Presented

1. Whether the State of North Carolina denied petitioner due process and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution, when it convicted him, a Negro, of violating a criminal trespass statute enforcing the frankly discriminatory sales practices of a drug store open to the general public.

2. Whether petitioner's conviction for a peaceable protest against the discriminating sales practice of the store did not violate his right to freedom of association and speech under the Fourteenth Amendment.

3. Whether the State of North Carolina denied petitioner due process of law guaranteed by the Fourteenth Amendment when it convicted him of violation of a criminal trespass statute when there was no evidence of such violation.

4. Whether the State of North Carolina denied petitioner due process of law guaranteed by the Fourteenth Amendment to the Constitution when it convicted him of violation of a criminal trespass statute which was void because of vagueness.

Constitutional Provision and Statute Involved

The Constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

The statute involved is General Statutes of North Carolina Sec. 14-134 (1866 c. 60; Code, s. 1120; Rev., s. 3688; C. S., 4305):

> "If any person after being forbidden to do so shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding $50.00 or imprisoned not more than 30 days."

Statement of the Case

On March 11, 1960, petitioner, a Negro, entered a drug store in Monroe, North Carolina, with his son and other teen-age students (R. 16). He testified that:

> "* * * We wanted service; that we had never been able to obtain service, only in a position of standing, and that morally and under the Constitution, that we felt that constitutionally we had a right to be served or we had a right under the First Amendment to the United States Constitution and due process of law; that there is equality in the service in the United States; and morally and religiously that this is contrary to our religious belief; that we had never before entered and asked to be served sitting. So we didn't know whether we would be served or not; that was left entirely up to the management." (R. 16-17)

The drug store did not prohibit the entrance of Negroes (R. 13-14). Its manager testified: "We hold our place of business out to be a place operated for the benefit and use of the public" (R. 13-14). But, in his words, he "refused to serve Robert Williams because he was a Negro" (R. 14). The company's president testified, "We serve them (Negroes) over at the cigar case there, drinks and stuff that they want to take them out a drink, and sandwiches in the bag" (R. 14). But "it wasn't our custom of serving colored people at the fountain sitting at the stools."

While the "conversation with Williams was very friendly, yes sir, very cordial and friendly" (R. 14), he declined to leave (R. 9). The manager left for a trespass warrant and petitioner followed about ten or fifteen minutes later * (R. 9, 13).

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* Petitioner returned briefly for about ten minutes (R. 19). However, the complaint or warrant of arrest was necessarily based upon the first fifteen-minute period.

Petitioner was charged in a complaint filed in the Recorder's Court of Union County that he did

> "With force and arms * * * unlawfully and wilfully did enter and trespass upon the land and premises of Jones Drug Company, Inc., after having been forbidden to enter said premises and not having a license to enter said premises and did unlawfully refuse to leave upon request." (R. 2)

After a trial and conviction in the Recorder's Court, petitioner secured a trial *de novo* by jury in the Superior Court (R. 34). He was again convicted and was sentenced to 30 days jail, which was suspended on condition that he pay a fine of $10 and remain on good behavior (R. 4).

Petitioner thereupon appealed to the Supreme Court of North Carolina, which, on January 20, 1961, affirmed the conviction in an opinion (R. 34-37) and entered a final judgment (R. 39, Appendix C).

How Federal Question is Presented

The federal questions recited herein were raised by a written *Motion for Judgment as of Non-suit upon Constitutional Grounds* which was filed in the Recorder's Court and in the Superior Court of North Carolina (R. 5-8).

This motion alleged that:

1. There was no evidence to support a claim of violation of the statute;

2. Petitioner was exercising his constitutional right to assemble and peaceably protest;

3. The State had discriminated against petitioner solely because of his race in violation of the equal protection and due process clauses; and

4. The drug store premises had been dedicated to a public use.

More particularly, the motion stated the following:

"1. That the defendant is charged in a warrant which charges a violation of North Carolina General Statutes 14-134, and the subject of which charge is trespass; that the evidence offered against the defendant clearly indicate that the defendant was peacefully upon the premises of Jones Drug Company, Inc., in Monroe, North Carolina, in a portion of the store upon which customers and would be customers are freely permitted to enter; that the defendant at no time trespassed against anyone or infringed upon the right of anyone; that the evidence adduced against the defendant does not indicate that he was in violation of the above mentioned statute or of any other provision of the law of North Carolina.

2. That the evidence offered and adduced against the defendant clearly indicates that the defendant was, at the time of the defendant's arrest and at all times covered by the warrant and charge against defendant, in the peaceful exercise of the defendant's constitutional rights to assemble for the purpose of speaking to and making peaceful protest in a peaceful manner to the manager of Jones Drug Company, Inc., Monroe, North Carolina, urging said manager to serve all of his patrons without racial discrimination; that at no time was the defendant defiant or in breach of peace in the area where defendant was arrested; that the arrest of the defendant on the charge of trespass was in reality a method of suppressing defendant's right of free speech and to be free from racial discrimination, and as such said arrest deprived defendant of rights guaranteed by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, and Section 17 of Article I of the North Carolina Constitution.

3. That the evidence offered and adduced against the defendant clearly indicates that the State in arresting defendant exercised its power on basis of race and has denied defendant equal protection of the law and has singled defendant out as a person to be arrested solely because of race, and such an arrest

deprived defendant of rights guaranteed by equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and Section 17 of Article I of the North Carolina Constitution.

4. That the evidence offered and adduced clearly indicate that the defendant because of race and color is being denied common access to the common market and thereby depriving defendant of the rights guaranteed by equal protection and due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Section of Article I of the North Carolina Constitution.

5. That the premises and business of the Jones Drug Co., Inc. was and has been dedicated to public use and cannot discriminate against persons of the public because of race and color in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and Section 17 of the North Carolina Constitution." (R. 5-6)

Petitioner, who took the witness stand on his trial in the Superior Court, testified as to the constitutional provisions upon which he had relied in seeking service in the drug store (R. 16-17). His counsel moved to dismiss at the close of the State's case (R. 14) and at the close of the petitioner's case (R. 18) upon the constitutional grounds set forth in the written motion for judgment (*supra*, pp. 5, 6). These motions were denied.

Upon the appeal to the Supreme Court of North Carolina, petitioner assigned as error the failure to grant his motion for nonsuit on the ground of insufficient evidence and on the constitutional grounds (R. 31).

The opinion of the Supreme Court of North Carolina noted the petitioner's "constitutional grounds" (R. 34) and expressly overruled them (34-37, Appendix A, *passim*).

Reasons for Granting the Writ

1. This case presents the constitutional issues which are raised by the application of State criminal sanctions against Negroes involved in the "sit-in movement". This movement, now widespread throughout the Southern part of the United States, is an effort by Negroes to obtain service at lunch counters located in stores which invite their patronage generally but discriminate against them in the form of the services rendered.

The action referred to is merely to sit peaceably at a lunch counter and wait for service. Most of these cases, as in the instant one, involve no violence, disturbance or even raised voices. In the present case, petitioner remained at the soda fountain only about ten minutes and then left the premises.

The constitutional question presented by all of these cases are essentially the same (*supra*, p. 2). Their public importance is quite obvious and need not be urged since this Court, in recent years, has reviewed a variety of State actions, all directed at the preservation of segregation in the South. *Bates* v. *City of Little Rock*, 361 U. S. 516; *Brown* v. *Board of Education*, 347 U. S. 483; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449; *Scull* v. *Virginia*, 359 U. S. 344; *Shelton* v. *Tucker*, —U. S. —, 29 U. S. Law Week 4055.

2. Most recently, in *Garner* v. *Lousiana*, No. 617, *Briscoe* v. *Louisiana*, No. 618, and *Hoston* v. *Louisiana*, No. 619, October Term 1960, this Court granted certiorari to review judgments of the Supreme Court of Louisiana upholding convictions for breach of the peace because of sit-ins at lunch counters (29 L. W. 3276). The legal issues in those cases and the instant one are very similar. It is thus appropriate that the Court hear the instant case at the same time that it considers the Louisiana cases. This was the procedure followed by the Court in granting certiorari in *Braden* v. *United States*, October Term, 1960, No. 54, over the opposition of the Solicitor General who urged that the

issues, if identical, could be decided in *Wilkinson* v. *United States*, October Term 1960, No. 37.*

3. This case presents the important question not previously decided whether a conviction of an invitee for trespass, solely because he is a Negro, constituted state action discriminating against Negroes in violation of the due process and equal protection clauses of the Fourteenth Amendment.

In *Shelley* v. *Kraemer*, 334 U. S. 1 a state court's enforcement of a restrictive covenant in a real property deed was held to constitute state action within the meaning of the Fourteenth Amendment, denying Negroes equal protection of the laws. That may be said equally about the owner of a store who admits all races to his premises but discriminates against Negroes in the manner of serving food, making them stand to receive their food for outside consumption.

It is true that in *Shelley* v. *Kraemer* two contracting parties faced an attempt by third parties to enforce the covenant by means of judicial action, while here the unwilling shopkeeper sought the aid of the state to enforce his own discriminary policies. Where the state attempts to impose discrimination, it is said, the Constitution will prevent it, but where the state merely enforces privately imposed discrimination, constitutional rights are not affected. *Griffen* v. *Collins*, 187 F. Supp. 149 (D. C. Md., 1960); *Williams* v. *Howard Johnson's Restaurant*, 268 Fed. 2d 845 (4th Cir.,

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* See this Court's grant of certiorari in *Taylor* v. *McElroy*, 358 U. S. 918, notwithstanding the prior grant in *Greene* v. *McElroy*, 358 U. S. 872; in *Dayton* v. *Dulles*, 355 U. S. 911, after the grant of certiorari in *Kent & Briehl* v. *Dulles*, 355 U. S. 881; in *Quinn* v. *United States*, 347 U. S. 1008; *Bart* v. *United States*, 347 U. S. 1011; and *Emspak* v. *United States*, 346 U. S. 809; and in both *Abramowitz* v. *Brucker*, 354 U. S. 920 and *Harmon* v. *Brucker*, 353 U. S. 956.

1959). Authority for such a position is found in the *Civil Rights Cases*, 109 U. S. 3 (1883) and the *Slaughter House Cases*, 83 U. S. (16 Wall.) 36 (1873).

Since 1883, however, great changes have taken place in our society and in our understanding of its institutions. Just as this Court in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), re-examined the basis of its decision in *Plessy* v. *Ferguson*, 163 U. S. 537, so should the court review the outmoded doctrines of the *Civil Rights Cases* and *Slaughter House Cases*. It is no longer appropriate to state that the discrimination by a storekeeper inside his store against citizens solely because of race is private, rather than state, action. The corporate owner of the store exists only as a creation of the state. Its rights as the owner or tenant of the premises it occupies have no meaning except by virtue of the law of the state. Its ability to demand payment for goods and services would be non-existent without the available sanctions of state law. And its power to discriminate among its patrons, as evidenced by this case, rests on the availability of state officers and state courts for enforcement.

4. Even without adopting this view, however, it cannot be denied that the state acted by convicting petitioner of a crime. In doing so, the state implicitly adopted as its own the discriminatory policies of the storekeeper. Assuming, *arguendo*, the absolute right of the storekeeper to choose its patrons for particular services, that choice can hardly be policed by the state without the state becoming a party to it. If the choice of patrons is based upon an unreasonable classification, the state's assistance denies equal protection of the laws to those excluded, and the storekeeper must be left to his own devices. He has invited the public to enter his premises, and cannot complain when it does so. If he chooses not to serve a part of that public,

he may refrain, but he cannot call upon the state to invoke *criminal* sanctions to oust those whose patronage he has sought. In the instant case, Negroes are welcome to patronize all parts of the store except the eleven stools of the soda fountain. The courts of North Carolina have come to the aid of a storekeeper, and on his complaint have convicted petitioner of a crime which consists of belonging to a class defined as the "sitting-eating-Negro".

Upon this theory the recent cases of *Slack* v. *Atlantic White Tower System*, 284 Fed. 2d 746 (1960) and *Williams* v. *Howard Johnson's Restaurant*, *supra*, can be reconciled with petitioner's position. There the plaintiffs sought declaratory judgments and injunctions restraining discriminatory treatment. The refusal of the courts to grant such relief is not inconsistent with a denial of the right of the state to impose criminal penalties against petitioner for entering a store open to the public and sitting on a stool impliedly for the use of the public. The imposition of such criminal penalty is admittedly based upon the fact that petitioner is a Negro. It is not asserted by the court below that the trespass statute is applied equally against Caucasians. This is a violation of the rule stated by this Court in *Gibson* v. *Mississippi*, 162 U. S. 565, 591:

> "The guaranties of life, liberty and property are for all persons within the jurisdiction of the United States or of any state, without discrimination against any because of their race. Those guaranties, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the nation and of the state, without reference to considerations based upon race. In the administration of criminal justice no rule can be applied to one class which is not applicable to all other classes."

See also *Yick Wo* v. *Hopkins*, 118 U. S. 356.

5. The conviction below conflicts with this Court's decisions protecting freedom of speech and association under the Fourteenth Amendment. Petitioner did not enter the

drug store in violation of any statute of the state or private prohibition of the drug store owner. His behavior inside the store was exemplary.

The question presented to this Court is whether the peaceable protests of petitioner, his son and the other young people involved constituted an exercise of freedom of speech and association protected by the Fourteenth Amendment. The decisions of this Court suggest that the answer is in the affirmative. *Thomas* v. *Collins*, 323 U. S. 516, 545; *Saia* v. *New York*, 334 U. S. 558; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449.

The fact that this peaceable protest took place on private premises does not make it criminally actionable in view of the fact that "[T]he public is generally invited to come in" (R. 9). *Marsh* v. *Alabama*, 326 U. S. 501, 506.

6. This case raises squarely the question that the conviction denied petitioner due process in view of the total absence of any evidence whatsoever of a violation of the criminal trespass statute.

The statute makes it a criminal offense for one "without a license" to "enter" upon the land of another "after being forbidden to do so" (*supra*, p. 2). In each one of the quoted respects the state appears to have proceeded to conviction without evidence.

Petitioner was not "forbidden" entry. On the contrary, "[e]verybody is free to enter either door" (R. 14); the discrimination is in the services available to Negroes (*Ibid.*). In fact since, "We hold our place of business out to be a place operated for the benefit and use of the public" (R. 13-14) petitioner was an invitee or license. Finally, it is not a criminal offense under the statute to remain, *i.e.* to "refuse to leave" (R. 2) as the complaint alleged.

Section 14-134 must be narrowly construed under familiar principles of law for three reasons: (1) It is a criminal statute; (2) it is sought to be applied here to peaceable exercises of speech and association protected by the Fourteenth Amendment; and (3) it is sought to be used to perpetuate a system of segregation inconsistent in this case at least with the spirit of the Fourteenth Amendment and possibly its letter.

Fairly construed, we believe this case raises substantial suspicion that the statute has been extended far beyond its original intent and fair application. It indicates that petitioner's right to due process under the Fourteenth Amendment has been violated because there is "no evidence whatsoever in the record" to support his conviction. *Thompson v. City of Louisville*, 362 U. S. 199.

7. As written and as applied in this case, the North Carolina statute is unconstitutionally vague. Although it is directed against persons who enter premises "after being forbidden to do so", it does not state who is authorized to issue the prohibition order. Is it a corporate officer, a store manager, the local government which promulgates an ordinance, or a police officer?

As construed, the statute applied not only to a person who "shall go or enter upon the land of another" but to a person who remains there. If the statute can be given this meaning, it was certainly not clearly conveyed to petitioner or to any other citizen. In this second respect, too, it raises constitutional questions of vagueness.

The statute's application is conditioned upon the fact that the person entering the premises is "without a license therefor." Again, the question arises as to what is the meaning of the term "license" and who it is who is authorized to issue the license. Fairly construed, by opening a store to the general public, a storekeeper grants a license to it to enter so long as the behavior is decorous (*supra*, p. 11). If the invited general public is "without a license" the statute is certainly vague on this third count.

The cases are quite clear on the requirements of precision in criminal statutes. The use of a term that is so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Company*, 269 U. S. 385, 391; *Small* v. *American Sugar Refining Company*, 267 U. S. 233, 238-240. The vagueness of the regulations is especially pernicious where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

Opinion of the Supreme Court of North Carolina

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1960

No. 440—Union

STATE,

v.

ROBERT WILLIAMS.

An appeal by defendant from Armstrong, J., 10 May 1960 Regular Criminal Term of Union.

Criminal action tried *de novo* on appeal from the Recorder's Court of Union County on a warrant charging that defendant on 11 March 1960 in Union County "unlawfully and willfully, did enter and trespass upon the land and premises of Jones Drug Company, Inc., afer having been forbidden to enter said premises and not having a license to enter said premises and did unlawfully refuse to leave upon request contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Plea: Not Guilty. Verdict: Guilty of trespass as charged in the warrant.

From judgment imposed in accord with the verdict, defendant appeals.

T. W. BRUTON, Attorney General, and RALPH MOODY, Assistant Attorney General, for the State.

T. H. WYCHE and W. B. NIVENS for Defendant, Appellant.

Appendix A

PARKER, *J.* Defendant testified in his own behalf. He has in substance two assignments of error. One, the denial by the court of his motion for judgment of compulsory nonsuit made at the close of all the evidence. He contends the motion should have been granted for two reasons: First, the insufficiency of the evidence, and second, on constitutional grounds. Two, this part of the charge: "Now, the court instructs you that the right of an operator of a private business, such as a drugstore and operating a lunch counter, to select the people it will serve or not serve is a right that our law recognizes."

The evidence for the State tends to show the following facts: On 11 March 1960 Jones Drug Company, Inc., was a privately owned retail drugstore situate in the town of Monroe. In it is a soda fountain with eleven stools, where sandwiches, coffee and soft drinks are sold. On the afternoon of 11 March 1960 defendant, a Negro, came into this store with ten or eleven teen-age Negro boys, and they sat down on the stools at the counter at the soda fountain. Whereupon, W. R. May, secretary, treasurer, part owner of the drugstore, and one of its managers, went to defendant, and asked him to leave, telling him they would not serve him at the fountain. He told him to leave several times. Defendant refused to leave. May told defendant he was going to get a trespass warrant, if he did not leave. Defendant said he couldn't get one. Then May went to the police station to get a warrant leaving defendant sitting on a stool at the soda fountain. The warrant in the case was sworn out by May.

After May left to procure a warrant, Dolan Jones, president of the drug company and co-manager, went over and told defendant, "that the store belonged to us, and it wasn't our custom of serving colored people at the fountain sitting at the stools and that we had the privilege of serving who we wanted to or who we didn't want to, and to save

trouble it would be good for him to get up and get out." Defendant continued to sit there. About ten or fifteen minutes after Jones told defendant to get out, defendant got up and went out, then he came back in and sat down again. After a while he went out again.

Defendant presents for decision in his written motion for judgment of compulsory nonsuit on constitutional grounds the same constitutional questions that were presented and decided in the cases of S. v. Avent et al., decided this day, and reported in 253 N. C. ——, —— S. E. 2d ——, with the addition that he contends that his rights guaranteed by the equal protection and due process clauses of the Fifth Amendment to the Federal Constitution were violated, as well as by the similar provisions of the Fourteenth Amendment.

In his brief he states these questions are presented for decision: One. Did the court err in refusing to grant his motion for judgment of involuntary nonsuit when defendant, a Negro, went into the store of Jones Drug Company, Inc., and took a seat at an eating counter which was customarily open to members of the White race? Two. Did the judicial process here constitute State action as prohibited by the Fourteenth Amendment to the Federal Constitution? Three. Did the court err in its charge as set forth in his sole assignment of error thereto?

Defendant in his brief has not favored us with any mention or discussion as to the alleged violation of his rights under the Fifth Amendment to the Federal Constitution. The Fifth Amendment, "unlike the Fourteenth, has no equal protection clause." Currin v. Wallace, 306 U. S. 1, 14, 83 L. Ed. 441, 450. "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government. * * * Due process and equal protection of the laws are guaranteed by the Fourteenth

Amendment, and this amendment operates to restrict the powers of the State, * * *" Brown v. New Jersey, 175 U. S. 172, 44 L. Ed. 119. Defendant has not shown that any of his rights were violated as guaranteed by the Fifth Amendment to the Federal Constitution, and we so hold.

The evidence was amply sufficient to carry the case to the jury. The constitutional questions presented for decision in this case, and the question presented by the assignment of error to the charge were decided in the cases of S. v. Avent et al., *supra*.

Upon the authority of those cases we find no error in the trial of the instant case. All defendant's assignments of error are overruled.

No Error.

APPENDIX B

Opinion of Supreme Court of North Carolina in *State* v. *Avent et al.* — N. C. —, 118 S. E. 2d 47

SUPREME COURT OF NORTH CAROLINA

No. 654

—o—

STATE,

v.

JOHN THOMAS AVENT, ET AL.

—o—

Seven criminal actions, based on seven separate indictments, which were consolidated and tried together.

The indictment in the case of defendant John Thomas Avent is as follows: "The Jurors for the State upon their oath present, That John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the county aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Company store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Company, owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Appendix B

The other six indictments are identical, except that each indictment names a different defendant.

The State's evidence tends to show the following facts:

On 6 May 1960 S. H. Kress and Company was operating a general variety store on Main Street in the city of Durham. Its manager, W. K. Boger, had complete control and authority over this store. The store has two selling floors and three stockroom floors, and is operated to make a profit. On the first floor the store has a stand-up counter, where it serves food and drinks to Negroes and White people. The luncheonette department serving food is in the rear of the basement on the basement floor. On 6 May 1960 S. H. Kress and Company had iron railings, with chained entrances, separating the luncheonette department from other departments in the store, and had signs posted over that department stating the luncheonette department was operated for employees and invited guests only. Customers on that date in the luncheonette department were invited guests and employees.

On 6 May 1960 these seven defendants, five of whom are Negroes and two of whom (Joan Harris Nelson and Frank McGill Coleman) are members of the White race, were in the store. Before the seven defendants seated themselves in the luncheonette department, and after they seated themselves there, W. K. Boger had a conversation with each one of them. He told them that the luncheonette department was open for employees and invited guests only, and asked them not to take seats there. When they seated themselves there, he asked them to leave. They refused to leave until after they were served. He called an officer of the city police department. The officer asked them to leave. They did not do so, and he arrested them, and charged them with trespassing. The seven defendants were not employees of the store. They had no authority or permission to be in the luncheonette department.

Appendix B

On cross-examination W. K. Boger testified in substance: S. H. Kress and Company has 50 counters in the store, and it accepts patronage of Negroes at those 50 counters. White people are considered guests. Had the two White defendants come into the store on 4 May 1960, I would not have served them in the luncheonette department for the reason they had made every effort to boycott the store. He would have served the White woman defendant, but he asked her to leave when she gave her food to a Negro. The object of operating our store in Durham is definitely to make a profit. It is the policy of our store to operate all counters dependent upon the customs of the community. It is our policy in Durham to refuse to serve Negroes at the luncheonette department downstairs in our seating arrangement. It is also our policy there to refuse to serve White people in the company of Negroes. We had signs all over the luncheonette department to the effect that it was open for employees and invited guests.

Captain Cannady of the Durham Police Department testified in substance: As a result of a call to the department he went to S. H. Kress and Company's store. He saw on 6 May 1960 all the defendants, except Coleman, seated at the counter in the luncheonette department. He heard W. K. Boger ask each one of them to leave, and all refused. He asked them to leave, and told them they could either leave or be arrested for trespassing. They refused to leave, and he charged them with trespassing. He knew W. K. Boger was manager of the store. He makes an arrest when an offense is committed in his presence, and the defendants were trespassing in his presence.

When the State rested its case, all seven defendants testified. The five Negro defendants testified in substance: All are students at North Carolina College for Negroes in Durham. Prior to 6 May 1960, Negroes, including some of the Negro defendants, had been refused service by S. H. Kress and Company in its luncheonette department. All

are members of a student organization, which met on the night of 5 May 1960, and planned to go the following day to Kress' store, make a purchase, and then to go to the luncheonette department, take seats, and request service. The following day the five Negro defendants did what they planned.

The White woman defendant, Joan Harris Nelson, is a student at Duke University. Prior to 6 May 1960 she had not attended the meetings at the North Carolina College for Negroes for the purpose of securing service at the luncheonette department of the Kress store, though she has attended some of the meetings since then. She had been on the picket lines in front of the store. On 6 May 1960 she went into the Kress store, bought a ball-point pen, went to the luncheonette department, and took a seat. She was served, and while eating she offered to buy some food for Negroes from the North Carolina College, who were sitting on each side of her. When she was served food, no Negroes were in the luncheonette department. Mr. W. K. Boger asked her to leave because she was not invited, and was antagonizing customers. She did not leave, and was arrested.

The White male defendant, Frank McGill Coleman, is a student at Duke University. On 6 May 1960 he went into the Kress store, bought a mother's day card, joined his friends, Bob Markham, a Negro, and they went to the luncheonette department, and seated themselves. He asked for service, and was refused. Mr. W. K. Boger asked them to leave, telling them they were not invited guests, and he refused to do so, and was arrested. Prior to this date he had carried signs in front of the Kress store and other stores discouraging people to trade with them.

Some, if not all, of the defendants had been engaged previously in picketing the Kress store, and in urging a boycott of it, unless their demands for service in the luncheonette department were acceded to.

Appendix B

Jury Verdict: All the defendants, and each one of them, are guilty as charged.

From judgments against each defendant, each defendant appeals.

T. W. Bruton, Atty. Gen., and Ralph Moody, Asst. Atty. Gen., for the State.

William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, F. B. McKissick and L. C. Berry, Jr., Durham, for defendants, appellants.

PARKER, *Justice.*

Each defendant—five of whom are Negroes and two members of the White race—before pleading to the indictment against him or her made a motion to quash the indictment. The court overruled each motion, and each defendant excepted. The motions were made in apt time. State v. Perry, 248 N. C. 334, 103 S. E. 2d 404; Carter v. Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839; 27 Am. Jur., Indictments and Information, § 141.

At the close of all the evidence each defendant made a motion for judgment of compulsory nonsuit. Each motion was overruled, and each defendant excepted.

S. H. Kress and Company is a privately owned corporation, and in the conduct of its store in Durham is acting in a purely private capacity to make a profit for its shareholders. There is nothing in the evidence before us, or in the briefs of counsel to suggest that the store building in which it operates is not privately owned. In its basement in the luncheonette department it operates a restaurant. "While the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating house and cookshop, to any other place where eatables are furnished to be consumed on the premises. Citing authority. It has been defined as a place to which a person resorts for the

temporary purpose of obtaining a meal or something to eat." State v. Shoaf, 179 N. C. 744, 102 S. E. 705, 9 A. L. R. 426. To the same effect see, 29 Am. Jur. (1960), Innkeepers, § 9, p. 12. In Richards v. Washington F. & M. Ins Co., 60 Mich. 420, 27 N. W. 586, 588, the Court said: "A 'restaurant' has no more defined meaning (than the English word shop), and is used indiscriminately for all places where refreshments can be had, from the mere eating-house or cook shop, to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishings of eatables to be consumed on the premises is subordinate." Quoted with approval in Michigan Packing Co. v. Messaris, 257 Mich. 422, 241 N. W. 236, and restated in substance in 43 C. J. S. Innkeepers § 1, subsection b. p. 1132.

No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. State v. Clyburn, 247 N. C. 455, 101 S. E. 2d 295; Williams v. Howard Johnson's Restaurant, 4 Cir., 268 F. 2d 845; Slack v. Atlantic White Tower System, Inc., D. C., 181 F. Supp. 124, affirmed by the U. S. Court of Appeals for the 4 Cir., 284 F. 2d 746; Alpough v. Wolverton, 184 Va. 943, 36 S. E. 2d 906; Wilmington Parking Authority v. Burton, Del., 157 A. 2d 894; Nance v. Mayflower Tavern, 106 Utah 517, 150 P. 2d 773. See 10 Am. Jur., Civil Rights, § 21; Powell v. Utz, D. C., 87 F. Supp.

811; and Annotation 9 Am. & Eng. Ann. Cas. 69—statutes securing equal rights in places of public accommodation. We have found no case to the contrary after diligent search, and counsel for defendants have referred us to none.

In Alpaugh v. Wolverton, supra [184 Va. 943, 36 S. E. 2d 908], the Court said: "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. Citing authority. His rights and responsibilities are more like those of a shopkeeper. Citing authority. He is under no common-law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. Citing authority."

In Boynton v. Commonwealth of Virginia, 81 S. Ct. 182, 188, the Court held that a Negro passenger in transit on a paid Interstate Trailways' journey had a right to food service under the Interstate Commerce Act, 49 U. S. C. A. § 1 et seq., in a Bus Terminal Restaurant situate in the Bus Station, and operated under a lease by a company not affiliated with the Trailways Bus Company. Then the Court in the majority opinion deliberately stated: "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

In State v. Clyburn, supra [247 N. C. 455, 101 S. E. 2d 296], the defendants were tried on similar warrants charging that each defendant unlawfully entered upon the land of L. A. Coletta and C. V. Porcelli after being forbidden to do so and did "unlawfully refuse to leave that portion of said premises reserved for members of the White Race knowing or having reason to know that she had no license therefor." Coletta and Porcelli did business under the trade name of Royal Ice Cream Company retailing ice cream and sandwiches. The building in which they did business

is separated by partition into two parts. One part has a door opening on Dowd Street, the other a door opening on Roxboro Street. Each portion is equipped with booths, a counter and stools. Over the Dowd Street door is a large sign marked Colored, over the Roxboro Street door is a similar sign marked White. Sales are made to different races only in the portions of the building as marked. Defendants, all Negroes, went into the building set apart for White patrons, and requested service. Coletta asked them to leave. They refused to do so, and were arrested by a police officer of the city of Durham. All were convicted, and from judgments imposed, all appealed to the Supreme Court. We found No Error in the trial. The Court in its opinion said: "The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. Madden v. Queens County Jockey Club, 296 N. Y. 249, 72 N. E. 2d 697. 1 A. L. R. 2d 1160; Terrell Wells Swimming Pool v. Rodriguez, Tex. Civ. App., 182 S. W. 2d 824; Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S., 447; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109 [16 L. R. A. 558]; Goff v. Savage, 122 Wash. 194, 210 P. 374; De La Ysla v. Publix Theatres Corporation, 82 Utah 598, 26 P. 2d 818; Brown v. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P. 2d 651; Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N. E. 2d 574; Coleman v. Middlestaff, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; Fletcher v. Coney Island, 100 Ohio App. 259, 136 N. E. 2d 344; Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants."

In an Annotation in 9 A. L. R., p. 379, it is said: "It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprie-

tor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." The Annotation cites cases from eight states supporting the statement. See to the same effect, Brookside-Pratt Mining Co. v. Booth, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417, and Annotation in 33 A. L. R. 421.

This is said by Holmes, J., for the Court in Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 256, 36 S. Ct. 583, 585, 60 L. Ed. 984, 987, a suit to restrain the Public Utlities Commission from exercising jurisdiction over the business of a taxicab company: It is true that all business, and, for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But, however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes * * *."

None of the cases cited in defendants' brief are applicable to the situation which obtains in the instant cases. For instance, Cooper v. Aaron, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5—public education; Boman v. Birmingham Transit Co., 5 Cir., 280 F. 2d 531—public transporation; Valle v. Stengel, 3 Cir., 176 F. 2d 697—a case in respect to an amusement park in the State of New Jersey, which State has a statute, R. S. 10:1-3, N. J. S. A., providing that no proprietor of a place of public resort or amusement. "* * * shall directly or indirectly refuse, withhold from, or deny to, any person any of the assoccodations, advantages, facilities or privileges, thereof * * * on account of race, creed or color," R. S. 10:1-6, N. J. S. A.

"The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it

does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, * * * property." 11 Am. Jur., Constitutional Law, § 335.

G. S. § 14-134 has been the statute law of this State for nearly a hundred years. It reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days." Then follows a proviso as to obtaining a license to go upon land of another to look for estrays. This statute is color blind. Its sole purpose is to protect people from trespassers on their lands. It is concerned with only three questions. One, was the land in either the actual or constructive possession of another? Two, did the accused intentionally enter upon the land of another? Three, did the accused so enter upon the land of another after being forbidden to do so by the person in possession? State v. Baker, 231 N. C. 136, 56 S. E. 2d 424.

G. S. § 14-126 has been the statute law of this State for many years, and reads: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor." This statute is also color blind Its purpose is "to protect possession only." State v. Baker, supra. We have repeatedly held in applying G. S. § 14-126 that a person who remains on the land of another after being directed to leave is guilty of a wrongful entry

even though the original entrance was peaceful. The word "entry" as used in each of these statutes is synonymous with the word "trespass." Statae v. Clyburn, supra.

The officer of the city of Durham had a right and duty to arrest all seven defendants in the luncheonette department of the Kress store, because all of them were committing misdemeanors in his presence. G. S. § 15-41. There is no merit in their contention that this constituted State action denying them rights guaranteed to them by the 14th Amendment to the Federal Constitution and by Article I, § 17, of the State Constitution. State v. Clyburn, supra.

Defendants in essence contend that the indictments should be quashed and the cases nonsuited because the judicial process here constitutes State action to enforce racial segregation in violation of their rights under the due process clause and under the equal protection of the laws clause of the 14th Amendment to the Federal Constitution, and in violation of their rights under Article I, § 17, of the State Constitution, and further that G. S. §14-134 and G. S. § 14-126 are being unconstitutionally applied for the same purpose. Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner. There is no merit to this contention.

The Court said in Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161, 3 A. L. R. 2d 441: "Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This interpretation has not been modified: Collins

v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; District of Columbia v. John Thompson Co., 346 U. S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480.

Private rights and privileges in a peaceful society living under a constitutional form of government *like ours* are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—and, hence, there is a fundamental inconsistency in speaking of the rights of an inidividual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. § 14-134 and G. S. § 14-126. There is a recognizable difference between State action that protects the plain legal rights of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the clear legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. § 14-134 and G. S. § 14-126, and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such judicial process violates no rights of the defendants guaranteed to them by Article I, § 17, of the State Constitution. To rule as contended by defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law, for it would be a

denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by Negro and White trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A. L. R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, § 76, p. 167; 6 C. J. S. Assault and Battery § 20(2). This is said in 4 Am. Jur., Assault and Battery, § 76, p. 168: "Even though the nature of the business of the owner of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful." It is further said in the same work, same article, § 78: "The right lawfully to eject trespassers is not limited to the owner or occupier of the premises, but may be exercised by his agent in any case where the principal might exercise the right." The motive of the owner of land in ejecting trespassers from his premises is immaterial so long as he uses no more force than is necessary to accomplish his purpose. 6 C. J. S. Assault and Battery § 20, p. 821. While people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth.

This is said in an article designated "The Meaning of State Action" by Thomas P. Lewis, Associate Professor of Law, University of Kentucky and appearing in Columbia Law Review, December 1960, Vol. 60, No. 8, in note 134, page 1122: "State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue

is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, supra note 92 (Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case."

In Slack v. Atlantic White Tower System, Inc., supra (181 F. Supp. 129), the Court said: "No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency."

In State v. Cooke, 248 N. C. 485, 103 S. E. 2d 846, 847, the defendants were convicted and sentenced on a charge that they did "unlawfully and wilfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises." We found no error. Their appeal was dismissed by a divided court by the United States Supreme Court. Wolfe v. State of North Carolina, 364 U. S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650. In neither the majority opinion nor in the minority opinion was the question of State action referred to. It seems that if the United States Supreme Court had thought that the arrest and prosecution was State action, it would have reversed our decision. It seems further that the action of that Court in dismissing the appeal means that a State has the power to enforce through arrest and an action for trespass the discrimination of a private owner of a private business operated on premises privately owned.

There is no merit in defendants' contention that all the cases should be non-suited, because the demands that they

leave Kress' store, their arrest by an officer of the city of Durham, and the judicial process here, is an unconstitutional interference with their constitutional rights of free speech, and of assembly to advocate and persuade for a termination of racial discrimination.

No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right. The answer to this contention is given by the Court in Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 453, 93 L. Ed. 513, 10 A. L. R. 2d 608: "Of course, even the fundamental rights of the Bill of Rights are not absolute. The Saia case, [Saia v. New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574] recognizes that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, Schenck v. United States, 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470, 473, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.' Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an emptly privilege in a place and at a time beyond the protecting hand of the guardians of public order."

The evidence in these cases shows that the White defendants, and most, if not all, of the Negro defendants were freely and without molestation exercising these rights upon the streets of the city of Durham. However, they had no constitutional right to exercise these rights as trespassers in Kress' store in violation of G. S. § 14-134 and G. S. § 14-126.

Appendix B

There is no merit in defendants' contention that the indictments should be quashed, and the cases nonsuited, because S. H. Kress and Company is licensed by the city of Durham to operate a retail store, and therefore racial discrimination in the store cannot be enforced. The license is not in the record before us, and there is no suggestion by defendants that the license issued to S. H. Kress and Company contained any restrictions as to whom S. H. Kress and Company should serve. The answer to this contention, showing it is without merit, is set forth in State v. Clyburn, supra, in Slack v. Atlantic White Tower System, Inc., supra, and in Williams v. Howard Johnson's Restaurant, supra [268 F. 2d 848] and defendants' contention is overruled upon authority of those cases. In the last case the Court said: "The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment."

Defendants further contend that the indictments should be quashed, and the cases nonsuited, because G. S. § 14-134 is too indefinite and vague to be enforceable under the due process clause of the 14th Amendment and under Article I, § 17, of the State Constitution, in that the statute does not require the person in charge of the premises to identify himself, and in the W. K. Boger did not identify himself when he asked them not to enter luncheonette department, and when he asked them to leave after they seated themselves. This contention is not tenable.

G. S. § 14-134 necessarily means that the person forbidding a person to go or enter upon the lands of another shall be the owner or occupier of the premises or his agent, and that is an essential element of the offense to be proved by the State beyond a reasonable doubt. The statute is not too vague and indefinite to be enforceable as challenged by defendants, because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof.

Appendix B

On a motion for judgment of compulsory nonsuit the State's evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. State v. Corl, 250 N. C. 252, 108 S. E. 2d 608. In our opinion, when the State's evidence is so considered, it permits the reasonable inference that all the defendants knew when W. K. Boger forbade them to go upon or enter the luncheonette department, and requested them to leave after they had seated themselves there, he was the agent of S. H. Kress and Company in charge of the store, and we so hold.

Defendants contend that all the cases should be nonsuited because the evidence is insufficient to carry the case to the jury. All defendants introduced evidence. Having done so, they waived their motions for judgment of involuntary nonsuit which they had made at the close of the State's case, and must rely on their similar motions made a the close of all the evidence. G. S. § 15-173.

Considering the State's evidence in the light most favorable to the State, and not taking defendants' evidence into consideration unless favorable to the State, or except when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence (State v. Nall, 239 N. C. 60, 79 S. E. 2d 354), as we are required to do in passing upon defendants' motions made at the close of all the evidence, it tends to show that all the defendants without legal or constitutional right or bona fide claim of right entered the luncheonette department of S. H. Kress and Company after having been forbidden by W. K. Boger, the manager and agent of S. H. Kress and Company there, to do so, and after they had been requested by him to leave, refused to do so. The fact, that the violations by all defendants of G. S. § 14-126 and G. S. § 14-134 were intentional, is shown clearly by their acts, by the two White defendants and by most, if not all of the Negro defendants in urging

people to boycott the Kress store, and further by the plan entered into by the Negro defendants on the night of 5 May 1960 to go the following day to the Kress store, enter the luncheonette department there, take seats, and demand service. The evidence was sufficient to carry the cases to the jury, and we so hold.

The motions to quash the indictments raise most, if not all of the constitutional questions raised by the motions for judgments of compulsory nonsuit made at the close of all the evidence. All these questions have been considered by the Court and most, if not all, discussed in the opinion. In our opinion, and we so hold, the trial court properly overruled the motions to quash the indictments, and correctly submitted all the cases to the jury.

Defendants' assignments of error relating to the evidence are without merit, and do not justify discussion.

Defendants' assignment of error to the charge of the court to the jury is to the whole charge, without any statement as to what part of it is, as they contend, error. Such an assignment of error is too general and indefinite to present any question for decision. State v. Dilliard, 223 N. C. 446, 27 S. E. 2d 85, 87, and cases there cited. In that case the Court said: "Unpointed, broadside exceptions will not be considered. Citing authority. The Court will not go on a voyage of discovery to ascertain wherein the judge failed to explain adequately the law in the case. Citing authority. The assignment must particularize and point out specifically wherein the Court failed to charge the law arising on the evidence." Further, defendants in their brief make no mention of the charge, and no exception to the charge appears in the record, except in the assignment of error. An assignment of error will be disregarded when it is not supported by an exception in the record, but only by an exception appearing in the assignment of error. Barnette v. Woody, 242 N. C. 424, 88 S. E. 2d 223; Watters v. Parish,

252 N. C. 787, 115 S. E. 2d 1. The assignment of error as to the charge as a whole, not being mentioned, in defendants' Brief is taken as abandoned by defendants. Rules of Practice in the Supreme Court, Rule 28, 221 N. C. 544; State v. Atkins, 242 N. C. 294, 87 S. E. 2d 507. However, a reading of the charge, which is in the record, shows that the trial judge correctly declared and explained the law arising on the evidence given in the cases, as required by G. S. § 1-180, and in particular instructed the jury to the effect that if the defendants entered the lucheonette department of the Kress store after being forbidden under a *bona fide* claim of right and if they had reasonable grounds for such belief, and refused to leave after they had been requested to do so under such claim, as they contend their evidence tended to show, then there would be no criminal responsibility, and it would be the duty of the jury to acquit all defendants. State v. Clyburn, supra; State v. Fisher, 109 N. C. 817, 13 S. E. 878. This Court said in State v. Crawley, 103 N. C. 353, 9 S. E. 409, which was a criminal action for entry upon land after being forbidden: "A mere *belief* on his part that he had such claim would not be sufficient; he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the court. State v. Bryson, 81 N. C. 595." This Court said in State v. Wells, 142 N. C. 590, 55 S. E. 210, 212: "True we have held in several well-considered decisions, that when the State proves there has been an entry on another's land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question of *bona fides* of such claim the defendant must show that he not only believed he had a right to enter, but that he had reasonable grounds for such belief. State v. Glenn, 118 N. C. 1194, 23 S. E. 1004; State v. Durham, 121 N. C. 546, 28 S. E. 22. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his

right to enter, then in addition to his right the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted." Defendants have nothing to complain of in respect to the charge, and their counsel evidently thought so by not mentioning the charge in their joint brief filed with us.

Defendants' motions in arrest of judgment, which the court overruled, and which defendants assign as error, are not mentioned in defendants' brief, and are taken as abandoned by defendants.

All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, § 17, of the North Carolina Constitution.

No error.

APPENDIX C

Judgment of the Supreme Court of North Carolina

COPY

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1960

No. 440 Union County

—o—

STATE

VS.

ROBERT WILLIAMS

—o—

This cause came on to be argued upon the transcript of the record from the Superior Court, Union County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable R. Hunt Parker, Justice, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion.

And it is considered and adjudged further, that the defendant and sureties to the appeal bond, H. B. Perry and George H. Rushing, do pay the costs of the appeal in this Court incurred, to wit, the sum of Forty-Five and 85/100 dollars ($45.85), and execution issue therefor.

A True Copy

ADRIAN J. NEWTON,
Clerk of the Supreme Court.
By: SARAH G. BARBEE,
Deputy Clerk.

Certified to Superior Court this 30th day of January, 1961.